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In the Supreme Court of the United States

OCTOBER TERM, 1962

COLUMBUS PRODUCTION CREDIT ASSOCIATION,
PETITIONER

v.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Constitutional provision and statutes involved	2
Statement	3
Reasons for granting the writ	7
Conclusion	15
Appendix A	17
Appendix B	27
Appendix C	30
Appendix D	31
Appendix E	36

CITATIONS

Cases:

Austin v. *The Aldermen*, 7 Wall. 694 9

California v. *Pacific Railroad Co.*, 127 U.S. 1 13

Carson v. *Roane-Anderson Co.*, 342 U.S. 232 8

Federal Land Bank of Wichita v. *Board of County Commissioners*, 368 U.S. 146 ..... 3, 7, 8, 10, 11

Kern-Limerick, Inc. v. *Scurlock*, 347 U.S. 110 9

Constitutional provision and statutes:

U.S. Constitution, Art. VI, para. 2 ..... 2, 8

Farm Credit Act of 1933, 48 Stat. 257, as amended, 12 U.S.C. 1131, *et seq.*:

Sec. 20 (12 U.S.C. 1131d) 4

Sec. 23 (12 U.S.C. 1131g) 4

Sec. 24 (12 U.S.C. 1131h) 4

Sec. 63 (12 U.S.C. 1138c) 3, 5, 6, 7, 8, 9, 14, 31

Farm Credit Act of 1953, Sec. 8, 67 Stat. 394, as amended, 12 U.S.C. 636g 4

Farm Credit Act of 1956, Sec. 101(b), 70 Stat. 659, 12 U.S.C. 1027(b) 4

Home Owners' Loan Act of 1933, Sec. 5(h), 48 Stat. 133, 12 U.S.C. 1464(h) 9

Constitutional provision and statutes—Continued

	Page
Ohio Revised Code:	
Sec. 5725.13–5725.17	5
Sec. 5725.26	5
Sec. 5733.01–5733.99	6
Sec. 5733.01	3, 32
Sec. 5733.05	3, 6, 32
Sec. 5733.06	3, 34
Sec. 5733.12	3, 35
Miscellaneous:	
77 Cong. Rec. 4685, 4687, 4689–4690, 4692–4693, 4696–4697, 4705	11, 12
Farm Credit Administration, Production Credit Associations, Report of Operations, December 1961	4
H. Rep. No. 171, 73d Cong., 1st Sess	10, 11
S. Rep. No. 124, 73d Cong., 1st Sess	10, 11

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STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

The Solicitor General, on behalf of the Columbus Production Credit Association, petitions for a writ of certiorari to review the decision of the Supreme Court of the State of Ohio in this case.

OPINIONS BELOW

The opinion of the Board of Tax Appeals of the State of Ohio (App. A, *infra*, pp. 17–26; R. 9–17)[1] is not officially reported. The opinion of the Supreme Court of Ohio (App. B, *infra*, pp. 27–29; R. 133–134) is reported at 173 Ohio St. 97, 180 N.E. 2d 1.

[1] "R." refers to the certified transcript of record, and the page references relate to the overall numbering system used therein.

agency (48 Stat. 259, 261, as amended, 12 U.S.C. 1131d, 1131g). It is under the local supervision of the Federal Intermediate Credit Bank of Louisville, which serves the Fourth Farm Credit District (composed of Ohio, Indiana, Kentucky and Tennessee), one of the 12 farm credit districts into which the United States is divided (67 Stat. 394, as amended, 12 U.S.C. 636g; 70 Stat. 659, 12 U.S.C. 1027(b)). The federal intermediate credit banks are the major source of the funds for loans made by the associations, which rediscount their borrowers' notes with the banks (48 Stat. 261, 12 U.S.C. 1131h).

While the initial capital for the operations of the production credit associations, in the amount of approximately $90 million, was provided by the federal government in 1933, the amount of federal financial participation has been steadily reduced in the intervening years. This was accomplished primarily through the requirement of Section 23 of the Farm Credit Act of 1933 (48 Stat. 261, as amended, 12 U.S.C. 1131g) that any borrower from an association must own class B stock in the association to the extent of $5 for every $100 borrowed, and through purchases of additional stock by such borrowers. At present, the Governor of the Farm Credit Administration holds class A stock in only 9 of the 487 production credit associations and class C stock in 3 others, the government's current investment being approximately $600,000.[3] Petitioner had retired all

[3] Production Credit Associations, Report of Operations, p. 2 (FCA, December 1961).

of its government-owned stock by 1953 and since that time has been entirely owned by farmer-members (R.27).

Section 63 of the Farm Credit Act of 1933 (48 Stat. 267, as amended, 12 U.S.C. 1138c) provides a tax exemption for the production credit associations in the following terms:

> Such * * * associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such * * * associations * * * shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed.

Accordingly, petitioner has regularly paid taxes on its real estate (*i.e.*, its office building). The last sentence of Section 63 provides:

> The exemption provided herein shall not apply with respect to any production credit association or its property or income after the class A stock held in it by the Governor has been retired * * *.

The Governor's class A stock in petitioner having been retired, petitioner also pays a tax imposed by Sections 5725.13–.17 of the Ohio Revised Code on the intangible property of a dealer in intangibles, which tax is (under Section 5725.26 of the Ohio Revised Code) in lieu of all other taxes on the property and assets of such a dealer, other than real estate.

The Ohio Department of Taxation assessed against petitioner arrearages for the years 1953 through 1959 in the payment of Ohio's corporate franchise tax (Sections 5733.01–.99 of the Ohio Revised Code), which is statutorily defined as a tax or fee "for the privilege of doing business in this state, owning or using a part or all of its capital or property in this state, or holding a certificate of compliance with the laws of this state authorizing it to do business in this state * * *" (Section 5733.01).[4] The assessment was for $6,947.25 in taxes plus penalties of $1,042.09. On petitioner's application for review on the ground that, under federal law, it was exempt from the franchise tax (R. 25–26), the assessment was affirmed by the Tax Commissioner of Ohio (*ibid*). Petitioner then appealed to the State Board of Tax Appeals on the same ground (R. 24–25; App. B, *infra*, p. 20).

The Board reversed the Commissioner's order. It found that the tax is "a franchise tax or license fee" that can be imposed on a federal instrumentality only to the extent allowed by Congress (App. A, *infra*, at p. 22). Noting that waivers of tax immunity are to be narrowly construed, the Board concluded that the Farm Credit Act contains "no clear waiver of

[4] The tax is a percentage of the "issued and outstanding shares of stock" allocable to the corporation's Ohio business, which, as defined, amounts to the book value of corporate net worth (Section 5733.05). The statute provides numerous provisions in aid of the enforcement of the tax, such as a requirement that an annual report be filed, the establishment of a lien on corporate property for payment of the tax, and a provision that a delinquent corporation loses its privilege of doing business in the State.

immunity in positive language" with respect to the imposition of state franchise taxes on production credit associations (*id.* at p. 23). It found support for this conclusion in an analysis of the Act, which in its view demonstrated that Congress did not intend that production credit associations be subjected to state control to the extent represented by the power to tax their "right to do business and the right to own property" in the State (*id.* at p. 25).

The Supreme Court of Ohio reversed the Board of Tax Appeals. Although recognizing that petitioner is a federal instrumentality and finding that the tax in question is a "franchise tax," the court found that Section 63 of the Farm Credit Act had, in language that is "clear," "broad and plain" and "not ambiguous," waived the immunity of production credit associations from state franchise taxation after their class A stock held by the government had been retired (App. B, *infra*, at p. 29).

REASONS FOR GRANTING THE WRIT

This case, like *Federal Land Bank of Wichita* v. *Board of County Commissioners*, 368 U.S. 146, decided last Term, is of substantial importance to the administration of the federal farm credit system. Notwithstanding an express congressional grant of immunity, the Supreme Court of Ohio has held a production credit association—concededly a federal instrumentality (App. B, *infra*, at pp. 28–29)—subject to a state franchise tax.[5] If generally followed

[5] The court also conceded that the tax is a "franchise tax" (App. B, *infra*, at p. 28).

throughout the Union, this decision will cost the federal farm credit system at least one-third of a million dollars annually, as we show below. We submit that the significance of this case to an important area of federal interest, the error in the decision of the court below and the necessity for a ruling on this point of uniform, nationwide applicability call for review by this Court.

1. As the court below recognized (App. B, *infra*, at pp. 28–29), the extent to which an instrumentality of the United States may be taxed by a State is a matter for Congress alone to determine. See, *e.g.*, *Federal Land Bank of Wichita* v. *Board of County Commissioners, supra*, 368 U.S. at 149; *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232, 233–234. In this instance, Congress has spoken clearly. By Section 63 of the Farm Credit Act of 1933, it has expressly exempted from state taxation[*] "[production credit] associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income." The decision of the court below, subjecting petitioner's franchise to state taxation, is in conflict with the congressional exemption and must, we submit, yield to the command of the Supremacy Clause, U.S. Constitution, Art. VI, para. 2.

The basis for the court's holding was that Congress had waived the immunity it had granted petitioner in Section 63, when it went on to provide that the exemption "shall not apply with respect to any production credit association or its property or income"

[*] Except for "any real property and any tangible personal property," see App. D, *infra*, at p. 31.

after the government's class A stock in the association has been retired (as it has been in petitioner's case). However, the "waiver" on which the court below relies is not coextensive with the statutory exemption. The waiver singles out only certain of the incidents specified in the exemption ("associations, their property, * * * and their income") and refrains from including those comprehended by the phrase, "their franchises, capital, reserves, surplus, and other funds."

The very face of the statute seems thus to negate any congressional waiver of immunity from franchise taxes. However, even if the statute were thought to be ambiguous on this point, the decision below could not be sustained. For it is settled that, before any effect will be given a putative waiver of the tax exemption of a federal instrumentality, "the waiver must be clear, and every well grounded doubt upon the subject should be resolved in favor of the exemption." *Austin* v. *The Aldermen*, 7 Wall. 694, 699; see also *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 122. Whatever else may be said for Section 63 of the Farm Credit Act, it certainly does not amount to a "clear congressional mandate" (*ibid.*) that the federal franchises of production credit associations should be exposed to taxation by the States.

Nor may it be supposed that Congress is incapable of speaking clearly to this point when it chooses to do so. The very same Congress that enacted the Farm Credit Act and its tax exemption provided, in Section 5 of the Home Owners Loan Act of 1933, 48 Stat. 133, 12 U.S.C. 1464(h), that while "[federal

savings and loan] associations, including their *franchises,* capital, reserves, and surplus, and their loans and income" are exempt from federal taxation, states and municipalities may impose nondiscriminatory taxes "on such associations or their *franchise,* capital, reserves, surplus, loans, or income" (emphasis supplied). In this, the only instance of which we know where Congress has consented to state taxation of the franchise of a federal instrumentality, the consent is "clear." In finding a conscious congressional consent equally clear with respect to production credit associations, the court below erred, and its decision should be reviewed here.

2. While the legislative history of the Farm Credit Act of 1933 sheds no clear light on the specific question presented,[7] it does provide ample basis for concluding that to subject the franchises of production credit associations to state taxation would be contrary to the intent of Congress. In the first place, to give the congressional "waiver" of exemption anything but a very narrow construction would undermine the salutary purposes of the legislation. Secondly, there is every reason to suppose that Congress purposefully withheld its consent to the taxation of the associations' franchises on the ground that that particular form of taxation would be inconsistent with the associations' federal character.

a. As this Court observed in *Federal Land Bank of Wichita* v. *Board of County Commissioners, supra,*

[7] The committee reports merely paraphrase the statutory language with respect to the tax exemption. H. Rep. No. 171, 73d Cong., 1st Sess., p. 6; S. Rep. No. 124, 73d Cong., 1st Sess. p. 6.

368 U.S. at 151, the purpose of the legislation establishing the federal farm credit system was to provide loans to farmers "at the lowest possible interest rates." The Farm Credit Act of 1933 was no exception. The Message from President Roosevelt that resulted in the passage of the Act (see 77 Cong. Rec. 4685) called for legislation "for the purpose of meeting the credit needs of agriculture at minimum cost" (Message of March 27, 1933). The sponsor of the bill, Representative Marvin Jones, in describing the conditions at which it was directed, said, "High interest rates have been the curse of agriculture," 77 Cong. Rec. 4687. To the same effect are the committee reports, H. Rep. No. 171, 73d Cong., 1st Sess., pp. 1–2; S. Rep. No. 124, 73d Cong., 1st Sess., pp. 1–2, and the debates, see, *e.g.*, 77 Cong. Rec. 4689, 4690, 4692, 4693, 4696, 4697.

Plainly enough, this purpose of securing production credit for the farmers "at the lowest possible interest rates" can be adequately served only by construing as liberally as possible the tax exemptions of the instrumentalities administering the system (and, of course, by construing any alleged "waiver" as narrowly as possible). These considerations lose none of their force when the operations of these instrumentalities no longer depend on the existence of government capital in them.[8] In no respect did

[8] It will be recalled that the Federal Land Banks, whose tax exemption was at issue in *Federal Land Bank of Wichita* v. *Board of County Commissioners*, *supra*, are wholly owned by federal land bank associations, which in turn are wholly owned by farmer-borrowers (see Brief for the Petitioner, No. 25, Oct. Term, 1961, pp. 15–16).

petitioner's operations change when, in 1953, it retired the last class A stock held by the government; it continues to function pursuant to the provisions of the Farm Credit Act and subject to detailed supervision by the Farm Credit Administration. Indeed, local ownership and operation was considered by Congress as but another of the means for increasing the efficiency and reducing the operating costs of the association, in order that they might best serve the purposes of the legislation. See, *e.g.*, 77 Cong. Rec. 4705. This conscientious effort on the part of Congress to secure farmer-borrowers the cheapest possible loans could be seriously weakened if the production credit associations' tax exemption is given anything but a generous construction. And such a construction, it would seem, must exclude the associations' franchises from state taxation.

b. As the Ohio Board of Tax Appeals found (App. A, *infra*, at pp. 23–25), there is apparent in the comprehensive statutory scheme for federal regulation of the production credit associations a purpose that they be subject only to *federal* managment and control, and it would be inconsistent with that purpose for an association to have to "make any adjustments in its organization or management or substitute any regulation demanded by Ohio statute for the authority given to the Governor under the federal act" (*id.* at p. 25). Accordingly, the Board concluded (*ibid.*) that Congress must not have intended the associations to be subject to state control to the extent implied by

the right to tax their federal franchises.[9] This conclusion quite reasonably attributes to Congress the view, long recognized by this Court, that to allow state taxation of federal franchises is, *pro tanto*, to concede some of the federal sovereignty inhering in them—indeed, "is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty." *California* v. *Pacific Railroad Co.*, 127 U.S. 1, 41.

3. The question presented by this case has arisen in a number of other States, and its resolution has produced widely divergent results. The taxing authorities of seven States in addition to Ohio have asserted the power to tax the federal franchises of production credit associations after all government stock has been retired.[10] Those in eight other States have issued opinions to the effect that Section 63 does not permit them to apply their franchise taxes to such associations.[11] This disparity of treatment, of

[9] The Board found that the congressional consent to other state taxation "does not carry with it the right to control the operations of" petitioner (App. A, *infra*, at pp. 23–24). However, the Ohio franchise tax is subject to a comprehensive scheme of auxiliary provisions that could, if enforced, seriously impede the operations of a corporation. See note 4, *supra*.

[10] California, Michigan, Minnesota, Montana, Oklahoma, Utah and Washington. In addition, associations in Connecticut and Vermont voluntarily pay a franchise tax measured by net income. See Appendix E, *infra*, at p. 37.

[11] Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina and South Carolina. Notwithstanding the ruling of the Attorney General of Georgia, the city of Athens, Georgia, requires the payment of a city license tax. See Appendix E, *infra*, at p. 37.

course, leaves the question largely open in the many other States having franchise taxes and in which production credit associations operate. The several associations should not, we submit, be subject to such conflicting interpretations of an important provision of the federal Act under which they operate. They are entitled to a uniformly applicable ruling as to their amenability, under Section 63 of the Act, to state franchise taxes. The matter should be finally resolved in this case by this Court.

4. This case is of considerable financial importance to the federal farm credit system. At present, 373 of the 487 production credit associations[12] operate in the 31 States imposing franchise taxes.[13] If all of these States should apply their franchise taxes to the associations within their borders, it is estimated that the total annual tax burden would amount to some $377,000.[14] To say that this would be a considerable burden upon the local associations and upon the farmer-borrowers who own them would be to state the obvious. And it would necessarily be, to some extent at least, at the expense of the federal farm credit system as a whole and of the important purpose it serves—to bring the farmers of the Nation credit for agricultural purposes at the lowest possible cost.

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[12] The Governor of the Farm Credit Administration still holds class A stock in 8 of these 373 associations, thus removing their franchises from any immediate threat of state taxation.

[13] See Appendix E, *infra*, at p. 36.

[14] Estimate furnished by Farm Credit Administration. See Appendix E, *infra*, at p. 36.

CONCLUSION

In view of the importance of this case to the federal farm credit system, of the error in the decision of the Supreme Court of the State of Ohio, and of the need for a generally applicable ruling as to the tax status of production credit associations, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1962.

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APPENDIX A

Before the Board of Tax Appeals, Department of Taxation, State of Ohio

Case No. 43890
(Franchise Tax)

COLUMBUS PRODUCTION CREDIT ASSOCIATION, COLUMBUS, OHIO, APPELLANT

v.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO, APPELLEE

[Entry: April 11, 1961]

Appearances

For the Appellant: W. S. Pealer & William J. Lohr, 50 West Broad Street, Columbus 15, Ohio.

For the Appellee: Mark McElroy, Ohio Attorney General, and Joseph D. Karam, Assistant, State House, Columbus 15, Ohio.

This cause came on to be considered by the Board of Tax Appeals upon notice of appeal filed herein on November 23, 1960, by the above appellant from a final order of the Tax Commissioner, dated July 27, 1960, in and by which final order the Tax Commissioner on consideration of an application for review and reconsideration affirmed a corporation franchise tax arrearage against the appellant for the years 1953, 1954, 1955, 1956, 1957, 1958 and 1959.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript furnished by the Tax Commissioner, a

stipulation of facts by the parties agreed upon at the time of the hearing of the matter at Columbus, Ohio, October 27, 1960, and the briefs of counsel.

The appellant is an association formed under the Farm Credit Act of 1933 for the purpose of making short term loans to farmers, without regard to the credit of the borrower at the time, for agricultural purposes, provided that the borrowers could qualify by purchasing stock in the association as set forth in the law.

The appellant association was organized and chartered under an Act of Congress, and Section 20 (12 U.S.C. 1131d) of that Act reads in part as follows:

> The governor is authorized and directed to organize and charter corporations to be known as "Production Credit Associations."
>
> The governor shall have power, under rules and regulations prescribed by him, or by prescribing the terms of the charter of the association, or both, to provide for the organization, management, and conduct of the business of the association; and the power of the governor shall extend to prescribing the amount of the stock of such association; fixing the territory within which its operations may be carried on; fixing the method of election and appointment of, and the amount and payment of the compensation of, directors, officers, and employees; fixing the maximum amount of individual loans which may be made; prescribing the conditions under which the stock may be retired; and providing for the consolidation of two or more such associations.

The "governor" referred to is the governor of the Farm Credit Administration authorized by the Farm Credit Act of 1933.

Section 63 (12 U.S.C. 1138c) of the Act reads as follows:

> The Central Bank for Cooperatives, and Production Credit Associations, and Banks for Cooperatives, organized under this chapter, and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds, and other such obligations issued by such banks, or associations shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority. Such banks, and associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such banks and associations, shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. The exemption provided herein shall not apply with respect to any production credit association or its property or income after the class A stock held in it by the Governor has been retired, or with respect to any bank for cooperatives or its property or income after the stock held in it by the United States has been retired.

The Tax Commissioner sets forth in his final order of July 27, 1960, that Section 5733.01, Revised Code, is the authority for the franchise tax arrearage certifications for the years 1953 through 1959, inclusive, in the amount of $6,947.25, plus a 15% penalty amounting to $1,042.09 and totaling $7,989.34.

The stipulation of facts is as follows:

(1) that Columbus Production Credit Association was incorporated January 26, 1934, pursuant to Title II of the Farm Credit Act of 1933 and a copy of the Articles of Incorporation are attached to this stipulation;

(2) that on January 31, 1934, the Governor of the Farm Credit Administration, by certificate, fixed the territory within which the Columbus Production Credit Association may operate, a copy of which certificate is attached to the stipulation;

(3) that since 1953, all of the shares of Class A stock held in the Columbus Production Credit Association by the Governor have been retired; that since 1953 neither the Federal Government nor any of its officials have held shares of any class whatsoever in said association; that the total shareholder interest in said association since 1953 has been in the hands of parties other than the Federal Government or its officials.

The Tax Commissioner contends that beginning in 1953, the appellant was no longer exempt from paying the tax referred to as the "franchise tax" under Section 5733.01, Revised Code, for the reason that the Governor had retired all Class A stock in the appellant association and that the appellant association should from that point be considered as a foreign corporation for profit.

It is the position of the appellant that the association was incorporated pursuant to an Act of Congress and continued to be an instrumentality of the United States since the beginning of 1953 and that, as such, the State of Ohio is without authority to levy the tax authorized by Section 5733.01, Revised Code, and that the exemption from such a tax continues after the Governor has retired all of the Class A stock in the association.

It is not seriously contended that the association is not an instrumentality of the United States. Therefore, this matter must be decided upon the interpretation of Section 63 (12 U.S.C. 1138c) of the Farm Credit Act of 1933 and the application of Section 5733.01, Revised Code.

Fee charged against domestic and foreign corporations

The tax provided by sections 5727.39 to 5727.62, inclusive, and 5733.01 to 5733.27, inclusive, of the Revised Code, for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state and each corporation not for profit organized pursuant to sections 1729.01 to 1729.28, inclusive, of the Revised Code, except as provided in sections 5733.09 and 5733.10 of the Revised Code, for the privilege of exercising its franchise during the calendar year in which such fee is payable, and the tax provided by sections 5727.39 to 5727.62, inclusive, and 5733.01 to 5733.27, inclusive, of the Revised Code, for foreign corporations shall be the fee charged against each corporation organized for profit and each corporation not for profit organized or operating in the same or similar manner as corporations not for profit organized under sections 1729.01 to 1729.28, inclusive, of the Revised Code, under the laws of any state or country other than Ohio, except as provided in sections 5733.09 and 5733.10 of the Revised Code, for the privilege of doing business in this state, owning or using a part or all of its capital or property in this state, or holding a certificate of compliance with the laws of this state authorizing it to do business in this state during the calendar year in which such fee is payable.

Section 5733.01, Revised Code, authorizes a tax or fee for the privilege of doing business in this state, owning or using a part or all of its capital or prop-

erty in this state, and is applied to a foreign corporation for the privilege of doing business in this state and for the privilege of owning a part or all of the foreign corporation's capital or property in this state. The tax is, in fact, a franchise tax or license fee. It is not a tax upon commerce, state or interstate, or upon income receipts or sales or upon property. Aluminum Co. v. Evatt, 140 Ohio St., 385.

The appellant association, being an instrumentality of the United States, is subject to state taxation only as Congress permits, both as to the extent and in the manner authorized. The Congress by statute consenting to taxation by a state confers a mere privilege for which nothing is given by the state or received by the United States and is simply a waiver of immunity.

An examination of Section 63 of the Act of Congress (12 U.S.C. 1138c) clearly discloses that a production credit association at the time of organization be immune from all taxation excepting certain federal taxes and federal, state, territorial and local taxation on any real property and any tangible personal property of such association to the same extent as other similar property is taxed.

The last sentence of the foregoing section provides:

> The exemption provided herein shall not apply with respect to any production credit association or its property or income after the Class A stock held in it by the Governor has been retired, * * *.

An analysis of the foregoing language which presents the situation subsequent to the retirement of the Class A stock held by the Governor is not a waiver of immunity or a consent given to the state to tax the appellant for the privilege of engaging in business under the provisions of Section 5733.01, Revised Code.

The waiver of immunity as to taxation of *property* and *income* of a federal instrumentality cannot be construed as a grant of power to a state the right to tax the privilege of said instrumentality to engage in business. *Austin* v. *Aldermen of Boston*, S.C., 7 Wall., 694, 19 L.E. 224, wherein Mr. Justice Swayne uses this language:

> * * * It is well settled that the States cannot exercise this authority in respect to any of the instrumentalities which the General Government may create for the performance of its constitutional functions. It is equally well settled, that this exemption may be waived wholly, or with such limitations and qualifications as may be deemed proper, by the law making power of the nation; but the waiver must be clear, and every well grounded doubt upon the subject should be resolved in favor of the exemption. * * *

Bearing in mind that the consent to tax real and tangible personal property to the same extent as other similar property is taxed existed prior to the retirement of the Class A stock held by the Governor, the waiver of immunity and consent to taxation after that time applies to any other property, whether tangible or intangible, of the association or its income, but there is no clear waiver of immunity in positive language directly upon the subject as required by law or a consent given to tax the right to do business within a state or the right to own property within a state.

The intention of Section 63 of the Farm Credit Act (12 U.S.C. 1138c) obviously is to completely control the subject with which it deals and to furnish the exclusive rule governing the extent and manner of state taxation. The consent to taxation appearing

therein does not carry with it the right to control the operations of the appellant.

Section 20 of the Farm Credit Act (12 U.S.C. 1131d) sets forth in detail the source of authority for the organization, management, and conduct of the business of the association, including the fixing of the territory within which its operations may be carried on, the method of election and appointment and compensation for directors, officers and employees and fixing the maximum amount of individual loans which may be made, prescribing the conditions under which stock may be retired and providing for the consolidation of two or more such associations. In none of these functions is the participation of the State of Ohio anticipated.

Further evidence that it was the intention of Congress to cause the operation of the production credit associations to be continuing as an instrumentality of the United States is the fact that the Governor is given authority to retire, purchase and cancel Class A stock at any time that in his judgment such action is called for.

Section 20 of the Farm Credit Act (12 U.S.C. 1131d) in part is as follows:

> The Governor may purchase Class A stock of any production credit association in such amounts as he determines are required to meet the credit needs of farmers in the area served by such association * * * The Governor may at any time require any production credit association to retire and cancel any Class A stock held by him in such association if, in his judgment, the association has resources available therefor * * *

Under Section 1701.01, Revised Code, to "retire" a share means to restore it to the status of an authorized but unissued share. The Governor, therefore,

has the authority to purchase shares of Class A stock when necessary, to retire shares of Class A stock when advisable, but retaining such retired shares for later issuance, and to cancel retired shares, if indicated.

The exemption set forth in Section 63 of the Farm Credit Act (12 U.S.C. 1138c) takes effect only when Class A stock, held by the Governor, has been retired. It is inconceivable that the Congress intended to permit any control over the operation of the associations that would be incurred by the application of Section 5733.01, Revised Code, and the regulatory sections included therein.

The statutes regarding the production credit associations as set up under the Farm Credit Act of 1933 do not anticipate that the management or control at any time be within the law or regulation of a state, and no provision is made therefor. It follows that a tax upon the right to do business and the right to own property in the State of Ohio is not included in the exemption provided which permits taxation of the property and income of the appellant after the Class A stock held by it by the Governor was retired prior to 1953. There is no provision in any of the federal sections that consents to the proposition that the association, which is deemed in the first instance to be an instrumentality of the United States, make any adjustments in its organization or management or substitute any regulation demanded by Ohio statute for the authority given to the Governor under the federal act.

It is the finding of the Board of Tax Appeals that subsequent to the year 1953 the appellant association has remained an instrumentality of the federal government and that Congress has given no authority to the State of Ohio to impose upon the appellant the

tax set forth in Section 5733.01, Revised Code, and that the final order of the Tax Commissioner dated July 27, 1960, should be, and the same is, reversed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation this day taken with respect to the above matter.

(S). RONALD R. CALHOUN,
Secretary.

APPENDIX B

COLUMBUS PRODUCTION CREDIT ASSN., APPELLEE, v. BOWERS, TAX COMMR., APPELLANT.

Taxation—Franchise tax—Section 5733.01, Revised Code—Production credit association subject to tax, when—Shareholder interest having passed to others than the federal government or officials

A production credit association is subject to the Ohio franchise tax imposed by Section 5733.01, Revised Code, after the shareholder interest in the association has passed to parties other than the federal government or any of its officials

(No. 37074—Decided February 7, 1962.)

APPEAL from the Board of Tax Appeals.

The Columbus Production Credit Association is a corporation which was organized on January 26, 1934, pursuant to Title II of the Farm Credit Act of 1933, for the purpose of making short and intermediate term loans to farmers for general agricultural purposes.

The Governor of the Farm Credit Administration chartered this corporation, which was organized by farmers, and directed it to conduct operations in a district composed of central Ohio counties designated by him.

The class B stock, which is the only voting stock in this corporation, is owned only by farmer-borrowers. The class A stock is owned by investors and by the governor on behalf of the United States.

Since 1933 all the shares of class A stock held in the association by the governor have been retired, and since 1953 the total shareholder interest in the association has been in the hands of others than the federal government or any of its officials.

The Tax Commissioner made a finding of Ohio franchise tax arrearage certifications against the association for the years 1953, 1954, 1955, 1956, 1957, 1958 and 1959, in a total amount of $6,947.25, plus a 15 per cent penalty, on the grounds that the association was a foreign corporation and that its exemption from taxation had terminated.

On appeal by the association, the Board of Tax Appeals reversed the order of the Tax Commissioner.

This cause is before this court on appeal by the Tax Commissioner.

Mr. W. S. Pealer and *Mr. William J. Lohr*, for appellee.

Mr. Mark McElroy, attorney general, and *Mr. John J. Dilenschneider*, for appellant.

O'NEILL, J. The question before this court is whether a production credit association is subject to the Ohio franchise tax imposed by Section 5733.01, Revised Code, after the shareholder interest in the association has passed to parties other than the federal government or any of its officials.

The association here is an instrumentality of the United States. It has inherent as well as specific statutory exemption from a state franchise tax. See Section 1138c, Title 12, U.S. Code (Farm Credit Act of 1933).

An instrumentality of the United States may not be taxed by a state unless Congress has granted consent to the state to tax. *McCulloch* v. *Maryland*, 4 Wheat. (U.S., 1819), 316, 4 L. Ed., 579; *Austin* v. *Aldermen* (U.S., 1869), 7 Wall., 694, 19 L. Ed., 224; *California*

v. *Central Pacific Rd. Co.* (1888), 127 U.S., 1, 32 L. Ed., 150, 8 S. Ct., 1073.

The Congress of the United States has granted consent to the state of Ohio to impose upon the Columbus Production Credit Association the tax authorized by Section 5733.01, Revised Code, by the language in Section 1138c, Title 12, U.S. Code (Farm Credit Act of 1933). The latter section first sets forth in statutory language the exemptions from taxation which are to be enjoyed by production credit associations, and then it sets forth in clear language under what conditions Congress consents to state taxation of such associations. This language is broad and plain, is not ambiguous, and is as follows:

"The exemption provided herein shall not apply with respect to any production credit association or its property or income after the class A stock held in it by the governor has been retired."

Decision reversed.

ZIMMERMAN, TAFT, MATTHIAS and BELL, JJ., concur. HERBERT, J., not participating.

APPENDIX C

JUDGMENT OF THE SUPREME COURT OF THE STATE OF OHIO

COLUMBUS PRODUCTION CREDIT ASSN., APPELLEE, *v.* BOWERS, TAX COMMR., APPELLANT.

JOURNAL 44, PAGE 557

APPEAL FROM THE BOARD OF TAX APPEALS

This cause, here on appeal from the Board of Tax Appeals, was heard in the manner prescribed by law. On consideration thereof, the decision of the Board of Tax Appeals is reversed for the reasons stated in the opinion herein.

It is ordered that a certified copy of the entry issue to the Board of Tax Appeals to carry this judgment into execution.

APPENDIX D

Farm Credit Act of 1933, 48 Stat. 257, as amended, Section 63, 12 U.S.C. 1138c, provides:

> The Central Bank for Cooperatives, and Production Credit Associations, and Banks for Cooperatives, organized under this Act, and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds, and other such obligations issued by such banks, or associations shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority. Such banks, and associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such banks, and associations, shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. The exemption provided herein shall not apply with respect to any production credit association or its property or income after the class A stock held in it by the Governor has been retired, or with respect to any bank for cooperatives or its property or income after the stock held in it by the United States has been retired.

The Ohio Revised Code (Page's Ann. ed., Supp. 1961) provides:

§ 5733.01 *Fee charged against domestic and foreign corporations.*

The tax provided by sections 5727.39 to 5727.62, inclusive, and 5733.01 to 5733.27, inclusive, of the Revised Code, for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state and each corporation not for profit organized pursuant to sections 1729.01 to 1729.28, inclusive, of the Revised Code, except as provided in sections 5733.09 and 5733.10 of the Revised Code, for the privilege of exercising its franchise during the calendar year in which such fee is payable, and the tax provided by sections 5727.39 to 5727.62, inclusive, and 5733.01 to 5733.27, inclusive, of the Revised Code, for foreign corporations shall be the fee charged against each corporation organized for profit and each corporation not for profit organized or operating in the same or similar manner as corporations not for profit organized under sections 1729.01 to 1729.28, inclusive, of the Revised Code, under the laws of any state or country other than Ohio, except as provided in sections 5733.09 and 5733.10 of the Revised Code, for the privilege of doing business in this state, owning or using a part or all of its capital or property in this state, or holding a certificate of compliance with the laws of this state authorizing it to do business in this state during the calendar year in which such fee is payable.

* * * * * *

§ 5733.05 *Determination of the value of issued and outstanding stock and intangible property.*

After the filing of the annual corporation report, the tax commissioner, if he finds such report to be correct, shall on or before the first

Monday in May determine the value of the issued and outstanding shares of stock of every corporation required to file such report. Such determination shall be made as of the date shown by the report to have been the beginning of the then current annual accounting period of such corporation. For the purpose of this section, the value of the issued and outstanding shares of stock of any such corporation shall be deemed to be the total value, as shown by the books of the company, of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of:

(A) Reserves for accounts receivable, depreciation, depletion and any other valuation reserves with respect to specific assets;

(B) Taxes due and payable during the year for which such report was made;

(C) Good will, appreciation and abandoned property as set up in the annual report of the corporation when said annual report is accompanied by a certified balance sheet of the company; such balance sheet shall not be a part of the public records, but shall be a confidential report for use of the commissioner only. The commissioner shall then determine the base upon which the fee provided for in section 5733.06 of the Revised Code shall be computed as follows: divide into two equal parts the value as determined in this section of the issued and outstanding shares of stock of each corporation filing such report; take one part and multiply by a fraction whose numerator is the net book value of all the corporation's property owned or used by it in this state, and whose denominator is the net book value of all its property wherever situated, in each case eliminating any item of good will, appreciation and abandoned property; take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the

date of the commencement of its current annual accounting period, and whose denominator is the total value of its business during said year wherever transacted.

In determining the value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation, the commissioner shall be guided by the provisions of sections 5709.02 and 5709.03 of the Revised Code, except that investments in the capital stock of subsidiary corporations at least fifty-one per cent of whose common stock is owned by the reporting corporation shall be allocated in and out of state in accordance with the value of physical property in and out of the state representing such investments.

On the first Monday in June, annually, the commissioner shall certify to the auditor of state the amount determined by him by adding the two figures thus obtained for each corporation.

§ 5733.06 *Amount of state bank or investment company fee due; exemption of bankrupt corporations; statement; due date.*

On or before the fifteenth day of June, annually, the auditor of state shall charge for collection from each state chartered bank and each investment company as defined in division (J) of 5711.01 of the Revised Code, a fee of one-tenth of one per cent of the value certified and from each other corporation a fee of three-tenths of one per cent upon the value certified and shall immediately certify the same to the treasurer of state, provided that no fee shall be charged from any corporation which has been adjudicated a bankrupt, or for which a receiver has been appointed, or which has made a general assignment for the benefit of creditors, except for the portion of the then current year during which the tax commissioner finds such corporation had the power to exercise its cor-

porate franchise unimpaired by such proceedings or act. The minimum fee for all corporations shall be fifty dollars.

Upon receipt of the certificate of the auditor of state, the treasurer of state shall mail to each corporation at its principal office in the state, or to such person in the state as the corporation designates in its report, a statement showing the value or the proportionate value of the shares of stock upon which such fee is charged, and the amount of the fee. Such fee shall be payable to the treasurer of state on or before the fifteenth day of the following July. If such fee is not paid on or before that time a penalty shall attach thereto as provided in section 5733.12 of the Revised Code. No penalty shall attach prior to the expiration of thirty days from the date of the mailing of the statement by the treasurer of state.

* * * * *

§ 5733.12 *Allocation of taxes; penalty for failure to pay taxes:*

All franchise fees or taxes received by the treasurer of state under sections 5733.01 to 5733.27, inclusive, of the Revised Code, shall be credited to the general revenue fund.

If any corporation fails to pay on or before the dates, or within the time fixed by law, the fee charged against it, the treasurer of state shall certify the list of such delinquent corporations to the auditor of state, who shall add to the tax or fee due a penalty of fifteen percent. The auditor of state shall forthwith prepare proper duplicates and reports of such taxes, fees, and penalties and certify them to the attorney general for collection.

Thirty days after he receives such duplicates of delinquent taxes, fees, and penalties from the auditor of state, the attorney general shall certify to the tax commissioner a list of the corporations that have failed to pay such taxes, fees, and penalties.

APPENDIX E

I. Estimated Annual Financial Impact if State Franchise Taxes Are Applied to Production Credit Associations

State	Franchise Tax	PCAs in State	Est. Annual Franchise Tax
Alabama	Ala. Code, tit. 51, § 358	8	$5,495
Arkansas	Ark. Stat. Ann., § 84-1834	14	8,451
California	Cal. Tax Code, §§ 23183, 24405	23	13,441
Colorado	Col. Rev. Stat. Ann., §§ 31-36-6, 31-36-7	8	1,400
Connecticut	Conn. Gen. Stat. Ann., § 12-214	1	----------
Delaware	Del. Code Ann., tit. 8, § 361(8)	1	25
Florida	Fla. Stat. Ann., § 608.33	10	5,401
Georgia	Ga. Code Ann., §§ 92-2401, 92-2403	26	7,200
Illinois	Ill. Rev. Stat., c. 32, §§ 157.133, 157.134, 157.140, 157.140½	18	7,222
Iowa	Ia. Code Ann. § 469A.127	16	705
Kansas	Kan. Gen. Stat. Ann., § 17-702	14	3,225
Kentucky	Ky. Rev. Stat. § 136.070	10	3,169
Louisiana	La. Rev. Stat. § 47.601	8	11,291
Michigan	Mich. Stat. Ann., § 21.203	10	18,619
Minnesota	Minn. Stat. Ann., § 290.02	21	14,365
Mississippi	Miss. Code Ann., § 9313	10	10,102
Montana	Mont. Rev. Codes Ann., § 84-5801	11	1,877
Nebraska	Neb. Rev. Stat., §§ 21-303, 21-306	14	2,020
New Mexico	N. Mex. Stat. Ann., § 51-13-2	5	1,014
North Carolina	N.C. Gen. Stat., §§ 105-88, 105-122	26	72,266
Ohio	Ohio Rev. Code, § 5733.06	11	39,299
Oklahoma	Okla. Stat. Ann., tit. 68, § 644.5	14	4,308
Pennsylvania	Pa. Stat. Ann., tit. 72, § 1871	11	12,833
South Carolina	S.C. Code, §§ 65-621, 65-625	18	4,335
Texas	Tex. Rev. Civ. Stat., art. 12.01-12.22	36	125,741
Utah	Utah Code Ann., § 59-13-3	2	345
Vermont	Vt. Stat. Ann., tit. 32, § 5902	3	739
Virginia	Va. Code Ann., § 58-450	13	295
Washington	Wash. Rev. Code, § 82.04.220	6	462
West Virginia	W. Va. Code Ann., §§ 935(80), 935(1)(80a)	4	1,845
Wyoming	Wyo. Stat. Ann., § 17-40	1	200
Totals		373	377,690

II. States Whose Taxing Authorities Have Ruled That State Franchise Tax Is Not Applicable to Production Credit Associations After Government Stock Retired

State	Date of Opinion	Official Rendering Opinion
Alabama	May 10, 1954	J. A. Stephens, Ass't Comm'r, Dep't of Revenue.
Florida	January 12, 1960	Richard W. Ervin, Attorney General.
Georgia*	January 31, 1955	Eugene Cook, Attorney General.
Kentucky	May 28, 1958	Clayton Stewart, Supv., Income Audit Sec., Dep't of Revenue.
Louisiana	June 25, 1959	Frederick S. Haygood, Atty., Dep't of Revenue.
Mississippi	March 5, 1959	John E. Stone, Atty., State Tax Comm'n.
North Carolina	December 9, 1948	Harry McMullan, Attorney General.
South Carolina	November 25, 1947	Claude K. Wingate, Asst. Attorney General**.

*City of Athens imposes annual license tax of $300 on North Georgia Production Credit Association, on basis of February 8, 1962, opinion of City Attorney James Barrow.

**Opinion reaffirmed on March 4, 1957, by Attorney General T. C. Callison.

III. States Whose Taxing Authorities Have Ruled That Franchise Tax Is Applicable to Production Credit Associations After Government Stock Retired***

State	Date of Opinion	Official Rendering Opinion
California		[Tax assessed, action for refund pending in Superior Ct. for Sacramento County.]
Michigan	March 25, 1952	Gregory Frederick, Asst. Attorney General.
Minnesota	April 13, 1948	Commissioner of Taxation.
Montana	March 14, 1962	Corp. License Tax Div., State Board of Equalization.
Oklahoma	April 6, 1962	Oklahoma Tax Commission.
Utah		[Tax assessed, protest pending before State Tax Commission.]
Washington		[Tax assessed, petitions for refund pending before State Tax Commission.]

***Associations in Connecticut and Vermont voluntarily pay franchise taxes based on net income.

SOURCE: Farm Credit Administration, Washington, D.C., 1962.

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No. 282

In the

Supreme Court of the United States

October Term, 1962

COLUMBUS PRODUCTION CREDIT ASSOCIATION,
Petitioner,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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INDEX

Statement of the case 1

Question presented 4

Argument 5

I. The decision of the Ohio Supreme Court is reasonable, lawful and correct and not in conflict with any decision of this court 5

A. 5

B. 8

II. Petitioner has shown no lack of uniformity among the states in interpretation of Section 63 of the Farm Credit Act 11

III. A denial of a writ of certiorari in this case will not result in state taxation of federal interests 12

Conclusion 13

Cases Cited

Austin v. The Alderman, 7 Wall., 694 6

Brenham Production Credit Association v. Zeiss, et al., 264 S.W. (2d), 95 (1953) 7

Kern-Limerick, Inc. v. Scurlock, 347 U.S., 110 6

State v. City of Hudson, 231 Minn., 127, 42 N.W. (2d), 546, 549 6

Zeiss, et al., v. Brenham Production Credit Ass'n., 259 S.W. (2d) 299 (Tex Civ. App. 1953) 7

Authorities Cited

Farm Credit Act of 1933 S. Rep. No. 124, p. 6, 73rd Cong., 1st Sess. (1933) 9

Farm Credit Act of 1933 H. R. Rep. No. 171, p. 6, 73rd Cong., 1st Sess. (1933) 9

Farm Credit Act of 1955 H. R. Rep. No. 863, 84th Cong., 1st Sess. 9

Farm Credit Act of 1933, Sec. 21, 48 Stat. 260 10

In the

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COLUMBUS PRODUCTION CREDIT ASSOCIATION,
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STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OF THE CASE

During the period 1953 through 1959 the Columbus Production Credit Association, petitioner herein, was located in Columbus, Ohio, and was engaged in the business of making short-term loans to farmers. The petitioner is a corporation organized on January 26, 1934 pursuant to Title II of the Farm Credit Act of 1933 (48. Stat. 267, as amended, 12 U.S.C. 1131 *et seq.*). By virtue of a certificate dated January 31, 1934 the Governor of the Farm Credit Administration directed the Columbus Credit Association to conduct operations in a district composed of eight counties in central Ohio.

Section 20 of the Farm Credit Act of 1933 (12 U.S.C. 1131d) authorized the Governor of the Farm Credit Administration to charter corporations to be known as production credit associations. Sections 20, 23 and 24 of the

Act (12 U.S.C. 1131d, 1131g and 1131h) provided that such organizations might be organized by ten or more farmers who desired to borrow money under the Act. The governor was authorized to fix the territory in which the association might operate (12 U.S.C. 1131d). Each association was to operate under the direction of a Board of Directors elected by its members. The associations were to be governed by those rules and regulations of the district Farm Credit Boards which were approved by the Farm Credit Administration.

Congress provided $120 million to get the production credit program under way. (48 Stat. 258). It authorized the Governor of the Farm Credit Adminstration to subscribe for $7,500,000 in stock in each of the twelve production credit corporations[1] (48 Stat. 257-58). The production credit corporations in turn were authorized to finance the local production credit associations by investing this money in Class A nonvoting stock of the associations. (48 Stat. 259, 260).

The Farm Credit Act of 1933 did not purport to call for perpetual federal investment in local production credit associations such as petitioner. Instead it provided for these associations to become wholly farmer-owned cooperatives. Both during the period when outstanding Class A stock was held by production credit corporations, and subsequent thereto, farmers participated in the ownership and management of production credit associations. Thus, Class B one-vote-per-member stock was provided for, and this stock could be "purchased only by farmer borrowers from the association and individuals eligible to become borrowers" (48 Stat. 260, 12 U.S.C. 1131e). The associations were

[1] In 1956 the production credit corporations were merged into the regional federal intermediate credit banks. (Farm Credit Act of 1956 §101, 70 Stat. 659, 12 U.S.C. §1027) This merger has no bearing on this case.

and are authorized to pay up to 7% dividend on both Class A and Class B stock (12 U.S.C. 1131f). The Farm Credit Act also provided that the regional production credit corporation "may at any time require the association to retire and cancel stock held by the corporation in such association, if, in the judgment of the corporation, the association has resources available therefor" (48 Stat. 259, 12 U.S.C. 1131c).

Since 1953, all the shares of Class A stock held in the Columbus Production Credit Association by the Governor of the Farm Credit Administration (who acquired such stock upon merger of the production credit corporations with the federal intermediate credit banks) have been retired. Since 1953 neither the Federal Government, nor any of its officials, have held shares of any class whatsoever in said association. Since 1953, the total shareholder interest in the Columbus Production Credit Association has been in the hands of parties other than the Federal Government or its officials.

Section 63 of the Farm Credit Act of 1933 (48 Stat. 267, as amended, 12 U.S.C. 1138c) provides a tax exemption for the production credit associations in the following terms:

> "Such * * * associations, their property, their franchises, capital, reserves, surplus, and other funds; and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such * * * associations * * * shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed."

Accordingly, petitioner has regularly paid taxes on its real estate (*i.e.*, its office building). The last sentence of Section 63 provides:

> "The exemption provided herein shall not apply with respect to any production credit association or its property or income after the class A stock held in it by the Governor has been retired * * *."

The Governor's Class A stock in petitioner having been retired, petitioner also pays a tax imposed by Sections 5725.13-.17 of the Ohio Revised Code on the intangible property of a dealer in intangibles, which tax is (under Section 5725.26 of the Ohio Revised Code) in lieu of all other taxes on the property and assets of such dealer, other than real estate.

The Ohio Department of Taxation assessed franchise tax arrearages against petitioner for the years 1953 through 1959 in the total amount of $6,947.25 plus a 15% penalty. Petitioner applied for review and the assessment was affirmed by the Tax Commissioner.

Petitioner appealed to the Ohio Board of Tax Appeals which reversed the Tax Commissioner, finding "no clear waiver of immunity in positive language" in Section 63 of the Farm Credit Act. The Supreme Court of Ohio in *Columbus Production Credit Association v. Bowers*, 173 O. S., 97, 180 N. E. (2d), 1, reversed the Board of Tax Appeals and affirmed the order of the Tax Commissioner, finding that in Section 63 of the Farm Credit Act, Congress in broad, plain and unambiguous language consented to state taxation of production credit associations.

QUESTION PRESENTED

Whether, in view of Section 63 of the Farm Credit Act of 1933, which provides a qualified exemption from state taxation for production credit associations, a state can constitutionally subject such an association to a tax on its federal franchise after all of the stock held in the association by the Federal Government has been retired.

ARGUMENT

I.

The decision of the Ohio Supreme Court is reasonable, lawful and correct and not in conflict with any decisions of this court.

A.

Petitioner in its first argument for writ of certiorari to this Court states that the Ohio Supreme Court based its decision on the ground that by the last sentence of Section 63 of the Farm Credit Act of 1933 Congress in clear, broad and unambiguous language waived petitioner's immunity from taxation. Petitioner then attacks this position arguing that all waivers of federal immunity must be in clear and unmistakable language and because the waiver here is not a verbatim repetition of terms of the exemption, it is not a clear waiver. Therefore, reasons petitioner, the decision of the Ohio Supreme Court that the waiver is clear cannot be sustained.

On the contrary, the respondent, Tax Commissioner of Ohio, first submits that petitioner has erred in its basic assumption. The subject matter before the Ohio Supreme Court was not federal immunity, but a specific statutory exemption from state taxation. The statute itself calls this removal from state taxing power an exemption, and of course the creation of such an exemption would have been wasted action were sovereign immunity involved. Consequently, the Ohio Supreme Court did not speak of a "waiver"[2] of governmental immunity in its decision for only a removal of an exemption was involved.

Exemption and immunity are two different terms. Exemption involves the supposition that property so ex-

[2] Petitioner at page 9 of its brief when speaking of the Ohio Supreme Court decision put the word *waiver* in quotation marks. Yet, the word *waiver* does not appear in the Ohio Supreme Court's opinion.

empted otherwise would be subject to taxation. Immunity involves the idea that, absent a constitutional or statutory provision, property would not be subject to taxation. *State v. City of Hudson*, 231 Minn., 127, 42 N.W. (2d), 546, 549. The cases of *Austin v. The Aldermen*, 7 Wall., 694, and *Kern-Limerick, Inc., v. Scurlock*, 347 U.S., 110, cited by petitioner both concerned waivers by Congress of federal immunity and both posited a requirement of clear and unmistakable language for such waiver. Whatever the requirements for a waiver of federal immunity, respondent submits that a sentence removing a statutory exemption set out in the same paragraph should be examined in a different light.

Respondent notes that petitioner's basic argument is that the removal of the exemption is not effective as to franchise taxes because the removal sentence is not coextensive with the exemption, and coextensive, according to petitioner, means a verbatim repetition of terms. However, the respondent answers that even though there is no verbatim repetition of terms, the consent to taxation is coextensive with the exemption. An examination of the statute itself indicates that certain items were given exemption, and then on specified conditions the exemption was removed from three subjects of taxation, *viz.*, (1) the production credit association, (2) its property and (3) its income. Considering that under the terms of the statute itself real and personal property were already subject to taxation, Congress, when removing the exemption as to property, could only be referring to those items of intangible property previously exempted. Thus, Congress itself felt that general language could be used to remove the granted exemption and used such language.

Furthermore, petitioner itself now pays taxes on intangible property, even though the consent to tax does not

repeat such terms as capital, surplus, reserves or other funds. Thus, petitioner itself does not accept its own reasoning that the exemption may be removed only by a verbatim repetition of terms.

Moreover, In *Zeiss, et al. v. Brenham Production Credit Ass'n.*, 259 S.W. (2d), 299 (Tex Civ. App. 1953), the only other case in this area, the Texas Court at page 301 stated the question before it in the following terms:

> "* * * whether the Capital Stock and Surplus of a Production Credit Association * * * is subject to taxation by the city in which it has its principal office, after it has repaid or 'retired' all money invested in it by the Federal Government and its agencies; and after it becomes completely owned by individuals."

The Texas Court held that the Production Credit Association was no longer exempt from taxation after the stock held in it by the United States or any of its agencies was retired. On appeal, *Brenham Production Credit Association v. Zeiss, et al.*, 264 S.W. (2d), 95 (1953), the Court said at page 96:

> "* * * It is conceded that this property may be assessed for taxation by the State * * * since all of the stock held in the association by the Production Credit Corporation has been retired. * * *"

The appellate Court then reversed the holding of the lower Court on the ground that the Production Credit Association was not a banking corporation within the meaning of the state statute. However, it is important to note that the Texas Court of Appeals held the capital stock and surplus of the association to be taxable once the exemption as to property was removed, and the association conceded this when it appealed. And in the instant case the petitioner makes the same concession by noting that it pays intangible tax. So, the respondent, Tax Commissioner of Ohio, sub-

mits that Congress intended, and petitioner agrees, that the removal of exemption in the last sentence of Section 63 of the Farm Credit Act applies to specific items in the exemption even though the removal sentence does not repeat those items verbatim.

As noted, the last sentence of Section 63 of the Act removes the tax exemption from three subjects, one of which is the production credit association itself. It is the contention of the Tax Commissioner of Ohio that if the removal of the exemption as to property renders capital and surplus taxable, the removal of the exemption with respect to the association itself means that the association as a business organization may be taxed and the association certainly includes the franchise. Therefore, respondent submits that the removal of the exemption is coextensive with the exemption even though there is no verbatim repetition of terms. Being coextensive, the removal of the exemption is as clear as necessary to render taxable the specific interests exempted earlier in the same paragraph.

B.

In its second argument the petitioner accuses the Ohio Supreme Court of ignoring the legislative history of the statute. Petitioner's argument is that the statute has intended to provide for low interest loans and that any but a very narrow construction of the removal of exemption would undermine the salutary purposes of the legislation. To show legislative history and intent the petitioner cites the message of President Roosevelt asking for such legislation and a statement of the sponsor of the bill that high interest rates are the curse of agriculture.

Respondent submits that more pertinent to the legislative history of the Farm Credit Act of 1933 are the committee reports accompanying the act which refer to "the tax ex-

emption" in general terms and make it clear that petitioner is not exempt here since its federally financed stock has been retired:

> "Section 63 provides that the corporations organized under the act shall be exempt from taxes, except that their real property and tangible personal property may be taxed. The tax exemption with respect to any production credit association and its property and income is not to apply after stock held in it by the production credit corporation has been retired . . ."

Sen. Comm. on Banking & Currency, *Farm Credit Act of 1933* S. Rep. No. 124, p. 6, 73rd Cong., 1st Sess. (1933). House Com. on Agriculture, *Farm Credit Act of 1933* H.R. Rep. No. 171, p. 6, 73rd Cong., 1st Sess. (1933) (same). In 1955 the Farm Credit Act was amended by Congress to provide for issuance of Class C stock (not issued or pertinent here). Among the sections amended was Section 63 of the Farm Credit Act. Section 63 was amended by Public Law 347, c. 785, Title II, sec. 205 (69 STAT. 663). In reporting on HR 5168, which later became Public Law 347, the House Committee on Agriculture had this to say about the existing law:

> "Under present law a production credit association is exempt from most taxes so long as the production credit corporation (now the Governor) owns any of its stock. When all stock of the association owned by the corporation (now the Governor) is retired, such tax exemption would terminate. Section 205 would provide that where the production credit corporation (now the Governor) holds no class A stock of an association but owns class C stock * * * the asseociation would be subject to taxation."
>
> (Parenthetical matter added) H. R. Rep. No. 863, 84th Cong., 1st Sess. (1955). Reported in U.S. Code Cong. & Ad. News (1955) vol. 2, p. 2949 at p. 2965)

Thus, it appears that in holding that the broad language of the last sentence of the exemption statute removed the

exemptions set out in the previous sentence, the Ohio Supreme Court did follow the intent of Congress.

Moreover, it appears that Congress' purpose in passing Section 63 of the Act was to provide an exemption only so long as stock financed by federal funds was still outstanding. It provided funds and an exemption simply to get the associations started during the depression. It was not Congress' intention to continue a tax exemption for associations which were on their feet after the depression and in which there was no longer any federal investment. Indeed, Congress provided that the associations would become more independent of federal control over certain internal affairs when the federally financed stock was retired (Farm Credit Act Sec. 21, 48 Stat. 260). Congress thus did not intend to extend the exemption of taxation beyond the period when the government held stock therein. Certainly Congress did not wish to give such associations a perpetual tax advantage as they improved their competitive position with other privately owned lending institutions which are subject to taxation.

The petitioner relies heavily on the fact that the production credit association is called a government instrumentality and is under the control of the Governor of the Farm Credit Administration. However, as petitioner notes, the extent to which an instrumentality of the United States may be taxed by a state is a matter for Congress alone to determine. In the statute in question Congress clearly intended to provide exemption from taxation with respect to this particular federal instrumentality and then on certain conditions to remove the exemption. These conditions have been met. Now that the Federal Government has turned over the property interest in petitioner to private parties, petitioner is a government instrumentality only in the sense that a corporation chartered under the laws of

Ohio and operated by private parties is an Ohio instrumentality; that is, that it operates under the laws of the government which chartered it.

With respect to the fact that the petitioner is under the control of the Governor of the Farm Credit Administration, the respondent notes that this is merely the necessary result of the fact that no federal corporation law exists, and so Congress must establish control anew for each corporation it charters. The respondent submits that the Governor in this case stands in the same place that state corporation laws stand with respect to state-chartered corporations. The petitioner is under the control of the Governor of the Farm Credit Administration; state corporations are under the control of their own state corporation laws as well as, in certain cases, the state banking commission and other agencies. Respondent therefore submits that there is no magic in the fact of the Governor's control which *ipso facto* renders the petitioner immune from taxation. Congress' intent was to remove exemption from taxation while retaining federal control.

It is, therefore, the contention of the respondent that the Ohio Supreme Court in construing the statute before it gave effect to the intent of Congress to subject production credit associations to state taxation when the government capital in such associations was withdrawn.

II.

Petitioner has shown no lack of uniformity among the states in interpretation of Section 63 of the Farm Credit Act.

Petitioner notes that seven states in addition to Ohio claim the right to tax the exercise of production credit association franchises, eight states claim they have no power to levy such a tax and the question has not been considered

in the other states. Petitioner contends that the associations are entitled to a uniform rule regarding their amenability to state franchise taxes.

However, state taxation of production credit associations depends in the first instance on whether such associations fall within the ambit of local taxing laws. Respondent submits that the petitioner has made no clear showing that the decisions of eight states not to tax the exercise of production credit associa on franchises were based entirely upon interpretations of Section 63 of the Farm Credit Act. Unless the franchise tax laws of the eight states which decline to tax the exercise of production credit association franchises have been found to extend to such franchises, the conflict of interpretations of Section 63 contended for by petitioner cannot be shown to exist.

Moreover, by noting the purported annual tax burden on the federal farm system if this petition for writ is denied, petitioner must assume that denial of petition for writ of certiorari here will result in uniform interpretation of Section 63 of the Farm Credit Act throughout the Nation on the basis of the Ohio Supreme Court's decision. Such uniformity as petitioner desires can therefore be achieved by this Court by denying this petition.

III.

A denial of a writ of certiorari in this case will not result in state taxation of federal interests.

Petitioner in discussing the financial importance of this case indicates that if the Ohio decision is affirmed the federal farm credit system will be subject to the burden of taxation. This, of course, is not exactly true since franchise taxes are not assessed against production credit associations which have federally owned stock. Whatever the burden of tax on the privately owned associations, it rests

ultimately on the shareholders, who like other shareholders in other lending institutions are private citizens in business for a profit. The burden is not on the Federal Government.

CONCLUSION

In view of the correct and lawful decision of the Ohio Supreme Court which is in accord with congressional intent, and not in conflict with decisions of this Court, the petition for writ of certiorari in this case should be denied.

Respectfully Submitted,

MARK MCELROY,
Attorney General,
JOHN J. DILENSCHNEIDER,
Assistant Attorney General,
Attorneys for Respondent.

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In the Supreme Court of the United States

October Term, 1962

CLEVELAND PROTECTION CREDIT ASSOCIATION, PETITIONER

v.

STANLEY J. BOWLAND, TAX COMMISSIONER OF OHIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF FOR PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 282

COLUMBUS PRODUCTION CREDIT ASSOCIATION, PETITIONER

v.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF FOR PETITIONER

In its Brief in Opposition to the petition for a writ of certiorari, respondent Tax Commissioner of Ohio makes several arguments that deserve some comment, and in the following paragraphs we deal briefly with each of them. Respondent has, we submit, presented no adequate reason for denial of the petition, and we respectfully urge that it be granted.

1. Respondent first argues (Br. Opp. 5–6) that the settled principle that a waiver of the tax immunity of a federal instrumentality must be clear and unambiguous (*Austin* v. *The Aldermen*, 7 Wall. 694, 699) does not apply to this case, because this case involves "statutory exemption" and not "federal immunity." The argument is without substance. In the first

place, petitioner, as a federal instrumentality, has implied immunity from state taxation except to the extent allowed by Congress, see, *e.g.*, *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477–479; the court below explicitly recognized this fact when it stated that petitioner "has inherent as well as specific statutory exemption from a state franchise tax" (Pet. App. 28). In the second place, respondent suggests no basis—and there is none—for his novel assumption that the principle requiring clarity in waivers of federal tax immunity is somehow less applicable to express statutory immunity than it is to judicially implied immunity; it would seem that, if anything, the contrary would be the case.

2. Respondent goes on to argue (Br. Opp. 6–8) that because petitioner voluntarily pays an Ohio tax on intangible property, it has in effect conceded that the waiver of tax immunity in the last sentence of Section 63 of the Farm Credit Act of 1933, 48 Stat. 267, as amended, 12 U.S.C. 1138c (Pet. App. 31), is coextensive with the grant of immunity earlier in that same section. The argument runs thus: if the omission of the words "their franchises" (which appear in the Section 63 *exemption*) from the Section 63 *waiver* means that the waiver does not extend to franchises, then, by a parity of reasoning, the same must be true with respect to "capital, reserves, [and] surplus" (also included in the exemption and excluded from the waiver); and yet (so the argument runs), petitioner has conceded that this latter is not so by paying a tax on intangibles. The short and

obvious answer to this is, of course, that, irrespective of what the Section 63 waiver may omit,[1] it expressly embraces "property"; the Ohio tax that petitioner pays is a tax on the intangible property of a dealer in intangibles, and is "in lieu of all other taxes on the other property and assets of such * * * dealer" except real estate (Ohio Revised Code, §§ 5725.13, 5725.26). If the waiver with respect to the taxation of petitioner's "property" applies to anything, it applies to this tax. That petitioner willingly pays it, and refrains from attempting to press the statutory exemption beyond what was plainly intended by Congress, should scarcely be held against petitioner as a reason for imposing an additional tax to which the congressional waiver of immunity does not clearly extend.

3. Respondent's discussion (Br. Opp. 8–11) of the legislative history of the Farm Credit Act of 1933 adds nothing; as we have previously noted (Pet. 10,

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[1] We suggest that respondent's easy equation of the "intangible property" on which petitioner unprotestingly pays taxes and the "capital, reserves, [and] surplus" exempted from taxation by Section 63 is unsound. Lest there be any question, petitioner does not concede that States may, under Section 63, tax the capital, reserves and surplus of production credit associations in which all of the class A stock held by the government has been retired; we note that the taxing authorities of at least two States have ruled that the taxes of those States on "corporate excess" are not applicable to such production credit associations because they would be on "capital," contrary to the terms of Section 63 (January 14, 1949, letter opinion of Francis M. Hill, Director, Massachusetts Division of Corporation Taxes; January 25, 1949, letter opinion of Harold W. James, Deputy Tax Administrator, Rhode Island Department of Finance).

n. 7), references to the tax immunity provision therein were mere paraphrases from which no valid conclusion can be drawn. We challenge respondent's assertion that "petitioner is a government instrumentality only in the sense * * * that it operates under the laws of the government which chartered it" (Br. Opp. 10–11) and that the supervision of the Governor of the Farm Credit Administration over petitioner is no different from the supervision of a state corporation commission over all corporations chartered by the State (Br. Opp. 11). Petitioner is a federal instrumentality because Congress expressly declared it to be such in Section 63 of the Farm Credit Act of 1933, *supra;* and the supervision over petitioner by the Governor provided for by Congress (see Pet. 3–4) is, we submit, far more pervasive than, and of an entirely different character from, that of state corporation commissions over ordinary state-chartered corporations. In any event, we question the relevance of this branch of respondent's argument; it is not the Governor's continuing supervision over petitioner even after the government's class A stock has been retired that calls for liberal construction of petitioner's tax exemption—it is the continuing interest of the federal government in securing credit for farmers at the lowest possible cost, an interest that does not terminate simply because a particular association may have reached a state of self-sufficiency whereby government capital is no longer needed.

4. While his argument is not altogether clear on this point, respondent seems to argue (Br. Opp. 11–12) that rulings by the tax authorities of other States

referred to by petitioner (Pet. 13, 37) may not actually be in conflict with the decision of the Supreme Court of Ohio because (1) the tax in question may not have been one to which production credit associations were in any event amenable, and (2) the ruling may not have been based on Section 63 of the Farm Credit Act of 1933, *supra*. We do not consider the existence, *vel non*, of such a conflict to be sufficiently critical to the merits of the petition to justify setting forth the full text of each of the opinions in question; moreover, since most of the opinions were based on written or oral submissions by representatives of the federal farm credit system, in some cases the opinion itself may not fully reflect the reasoning behind it. Suffice it to set forth one of these opinions in the margin[2] as clear evidence that

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[2] [letterhead omitted]

9 December 1948.

Subject: State Taxation of Franchise Granted by Federal Government.

Mr. Frank P. McGowan
General Counsel
Farm Credit Administration of Columbia
Columbia, South Carolina

DEAR MR. MCGOWAN: Reference is made to your letter of December 1, 1948, in which you state that certain of the production credit associations organized in North Carolina under the Farm Credit Act (12 U.S.C. 1131, et seq.) are considering retiring all stock held by the Production Credit Corporation [now the Governor of the Farm Credit Administration].

It is the opinion of this office that even after this step has been taken the production credit associations so acting in North Carolina will not be subject to the North Carolina corporation franchise tax. The last sentence of Section 63 of the Farm Credit Act, providing that only the property and income of an association lose their immunity from State taxation after

a direct conflict does exist among state taxing authorities with respect to the question presented herein.

5. Respondent notes (Br. Opp. 12–13) that, if the decision below stands, there will be no direct financial burden on the federal government. Petitioner has never contended otherwise. As petitioner has shown (Pet. 14)[2], the burden of the decision below, and any other like it that may be rendered in the future, will fall upon the federal farm credit system as a whole

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the retirement of all stock owned by the Production Credit Corporation, is in conformity with the general rule that a State cannot lawfully do anything to impair or cripple franchises, rights, and privileges derived from the United States. *California* v. *Central P.R. Co.*, 127 U.S. 1; *United States* v. *Arredondo*, 6 Pet. (U.S.) 691. This rule has been consistently followed and it is significant to note that attempts to tax Federal franchises have been uniformly held invalid, regardless of the ownership of the corporation or the nature of the business. For a review of the authorities see: Stoke, *State Taxation and the New Federal Instrumentalities*, 22 Iowa Law Review, 39. Cf. *Leggett* v. *Bank*, 204 N.C. 151, 167 S.E. 557 (1933).

Yours very truly,

HARRY MCMULLAN,
Attorney General [of North Carolina]
(S) J. E. Tucker,
JAMES E. TUCKER,
Assistant Attorney General

[2] We take this occasion to correct an error in Appendix E to the petition (p. 36) and of a statement on p. 14 of the petition based upon the appendix. The estimated annual franchise tax for the State of Washington should be $10,922.00 instead of $462.00; the understatement resulted from a computation on a net instead of a gross income basis. This would change the total estimated annual franchise tax appearing at the bottom of Appendix E and at p. 14 to $388,150.00. (Source: Farm Credit Administration, Washington, D.C., 1962.)

and will operate to the detriment of that system's basic purpose of bringing the farmers of the Nation credit for agricultural purposes at the lowest possible cost.

Respectfully submitted.

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